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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1223

MATT KOEHL; THE AMERICAN NAZI PARTY,

Petitioners,

—v.—

STANLEY R. RESOR, Secretary of the Army;
MELVIN R. LAIRD, Secretary of Defense,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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No. .....

MATT KOEHL; THE AMERICAN NAZI PARTY,

Petitioners,

—v.—

STANLEY R. RESOR, Secretary of the Army;
MELVIN R. LAIRD, Secretary of Defense,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, Matt Koehl and the American Nazi Party, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on November 24, 1969.

Opinions Below

The opinion of the Fourth Circuit, a per curiam affirmance of the opinion of the District Court, is reported at 417 F.2d 1338 (1969) and is set out in the Appendix, *infra*, p. 1a.

The opinion of the United States District Court for the Eastern District of Virginia is reported at 296 F. Supp. 558 (1969) and is set out in the Appendix, *infra*, pp. 2a-9a.

Jurisdiction

The judgment of the Court of Appeals was entered on November 24, 1969. The jurisdiction of this Court is conferred by 28 U.S.C. Sec. 1254(1).

Questions Presented

1. Whether the First Amendment bars government officials from prohibiting the presence of symbols as part of a burial ceremony in a national cemetery.

2. Whether the First Amendment protects the wearing and display of political symbols as part of a burial ceremony in a national cemetery.

3. Whether the determination to bar petitioners' symbols from a burial ceremony in a national cemetery is a prior restraint in violation of the First Amendment.

4. Whether the determination to bar petitioners' symbols from a burial ceremony in a national cemetery is a denial of due process and equal protection in violation of the Fifth Amendment.

5. Whether the decision of the court below is clearly erroneous and devoid of evidentiary support.

Constitutional and Statutory Provisions and Regulation Involved

Constitution

First Amendment:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fifth Amendment:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . "

Statute

24 U.S.C. §281:

> "(a) Under such regulations as the Secretary of the Army may, with the approval of the Secretary of Defense, prescribe, the remains of the following persons may be buried in national cemeteries:
>
> "(1) Any member or former member of the Armed Forces who served on active duty (other than for training) and whose last such service terminated honorably . . . "

Regulation

Army Regulation, TM 10-287:

See Appendix, *infra*, pp. 10a-18a.

Statement of the Case

Petitioners' decedent, George Lincoln Rockwell, died on August 25, 1967 (R. 108). He had been discharged honorably from the Naval Reserve in 1960 and under the applicable statutes and existing Army regulations was entitled to be buried in any national cemetery other than Arlington National Cemetery (R. 109; p. 3, *supra;* App., *infra,* p. 19a).

On August 28, 1967, petitioners applied for permission to bury their decedent (R. 109). The Secretary of the Army indicated that although decedent was entitled to burial in any national cemetery other than Arlington National Cemetery, any ceremony would have to be in accordance with certain standards which had never before been imposed on any funeral party (R. 9, 109; Ex. 1-A; App., *infra,* p. 19a).[1] These standards, which preclude "the wearing of uniforms, insignia, and emblems, or the display of flags or banners of the American Nazi Party," are not contained in applicable Army Regulation TM 10-287, which was relied upon by the respondents in the courts below (*Ibid.*).

On August 28, 1969, a burial permit subject to the above conditions was issued for the burial of the decedent in Culpeper National Cemetery in Culpeper, Virginia (R. 110). On August 29, 1967, pursuant to that permit, a hearse carrying decedent's body and accompanied by six walking mourners dressed in khaki clothes with swastika armbands and bearing flags, banners, and floral arrange-

[1] The abbreviation "Ex." refers to the joint exhibits, attached to the joint stipulation of facts (R. 108-113), which accompany the record in this case.

ments containing swastika symbols approached the entrance of Culpeper National Cemetery. They were informed by the superintendent of the cemetery and representatives of respondents that they could not enter the cemetery until they removed the armbands and other insignia and left the flags, banners, and floral arrangements outside the cemetery walls. This petitioners refused to do (R. 110). The Army's Provost Marshal General, Carl Turner, then canceled the permit (R. 25, 111).

Nothing in the stipulated facts indicates the presence of a potential breach of the peace or other danger of any kind to the cemetery or national security.

Thereafter on September 7, 1967, counsel for petitioners wrote to Secretary Resor describing the type of ceremony proposed by petitioners (App., *infra*, pp. 20a-22a). The proposed ceremony would last less than forty-five minutes and appropriate music and eulogies would be made in low tones at the graveside. The mourners planned to wear the armbands and to carry flags, banners, and floral arrangements appropriate to their ceremony. At the conclusion of the ceremony, the mourners would promptly leave the cemetery grounds (R. 10-11; Ex. 5-E).

Several weeks later, Secretary Resor replied by letter that he would not alter the policy he promulgated on August 28, 1967; he refused to permit the mourners to wear and carry their flags, banners, and floral arrangements and other insignia into Culpeper National Cemetery. He did not object to petitioners' singing songs, playing music and delivering eulogies (R. 108; Ex. 6-F; App., *infra*, pp. 23a-24a).

This case presents the first instance in which anyone has been precluded from wearing or bearing any symbol, flag,

or uniform in a national cemetery during a funeral ceremony (R. 112). Indeed, §204 of TM 10-287 authorizes the display of the Confederate flag in national cemeteries, although this flag symbolized the violent overthrow of constitutional government (R. 108; Ex. 2-B, App., *infra,* p. 12a). Members of the Knights of Columbus, the Masons, and the American Legion, *inter alia,* are permitted to wear their symbols during ceremonies in national cemeteries (R. 112). Delegations from foreign countries of course wear their symbols and uniforms at state funerals. When the trial court asked counsel for the government whether the court would be prohibited from wearing a Republican symbol on his lapel in a national ceremony, the response was negative (Tr. 9, 27, 28, 29, 31, 32, 33).[2]

Petitioners' complaint in the United States District Court for the Eastern District of Virginia (Alexandria Division) sought a mandatory injunction requiring respondents to permit the burial service petitioners proposed (R. 1). The parties entered into a stipulation of facts prior to trial (R. 108-113).[3]

The District Court accepted jurisdiction but dismissed the complaint on the merits, holding that petitioners had intended a political demonstration "for the airing of grievances" and that neither their First nor Fifth Amendment rights had been abridged (App., *infra,* pp. 7a-9a). The

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[2] The abbreviation "Tr." refers to the transcript of the trial, which is volume 2 of the trial court record.

[3] Although the stipulation of facts and the District Court opinion indicate that petitioner American Nazi Party once ran a candidate for governor of Virginia, the trial court recognized that this fact was in error and that petitioner was not the party which ran a candidate (R. 109; Tr. 45-46).

Fourth Circuit affirmed on the opinion of the District Court (App., *infra*, p. 1a).

The constitutional questions were raised in the District Court in the complaint (R. 1) and at oral argument (R. vol. 2) and in the Court of Appeals in the brief and at oral argument.

Reasons for Granting the Writ

1. This Court's decisions have repeatedly vindicated as First Amendment activity the wearing and displaying of symbols during an authorized presence on public property. Yet despite its clear kinship to "pure speech" [4] and without any showing of any danger or of any other overriding governmental interest, petitioners' symbolic expression was barred, allowing only the singing of songs, the playing of music, and the delivering of eulogies. The decision of the court below barring petitioners' symbols in the circumstances of this case is in direct conflict with decisions of this Court and of other federal courts. Cf. *Thompson* v. *Clifford*, 408 F.2d 154 (1966).

In *Tinker* v. *Des Moines Community School District*, *supra*, this Court found violative of the First Amendment a public school policy barring students from wearing armbands objecting to the hostilities in Vietnam. Rejecting even the possibility of disturbance as grounds for barring symbols, this Court said:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression . . . . Any variation

[4] *Tinker* v. *Des Moines Community School District*, 393 U.S. 503, 505 (1969).

> from the majority's opinion may inspire fear . . . . But our Constitution says we must take this risk, *Terminiello* v. *Chicago*, 337 U.S. 1 . . . (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the vigor and strength of Americans who . . . live in this relatively permissive, often disputatious society.[5]

The *Tinker* decision follows this Court's long-time recognition that symbolic speech is protected by the First Amendment, and the decision below is in conflict with this entire line of decisions. See *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943); *Stromberg* v. *California*, 283 U.S. 359 (1931); cf. *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Brown* v. *Louisiana*, 385 U.S. 131 (1966). Moreover, the decision of the Fourth Circuit in this case brings it into conflict with the Fifth Circuit in *Burnside* v. *Byars*, 363 F.2d 744 (1966), overturning a regulation forbidding the wearing of "freedom buttons" because they were thought to lead to a disturbance. Certiorari should be granted to resolve the clear conflict with decisions of this and other courts concerning the continued vitality of symbolic expression under the First Amendment.

2. Although we believe its findings are clearly erroneous, the District Court found that petitioners were seeking to engage in a political demonstration when they sought to bury their decedent in Culpeper National Cemetery without

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[5] 393 U.S. at 508.

adhering to the conditions of the Secretary of the Army. Assuming *arguendo* that the District Court was correct in its findings of fact, its conclusion that Secretary Resor acted within constitutional bounds is contrary to the decisions of this Court and of other federal courts.

In particular, the Second Circuit in *Wolin* v. *Port of New York Authority,*[6] held that a governmental agency could not prohibit the right of free political expression at the Port Authority bus terminal in the absence of meaningful interference with the primary purpose of the terminal. The Second Circuit rejected the argument that the expression had to bear a special relation to the conduct of the terminal, holding that the proper locus of political expression did not "turn on the relevance of the premises to the protest . . ."[7] In the instant case, petitioners' conduct is consonant with the purpose of the cemetery, and the "propriety of a place for use as a public forum . . ." here, as in *Wolin,* is a decision beyond the power of government.[8]

This is not a situation where a group sought permission to enter a national cemetery solely to hold a demonstration consonant with its views. On the contrary, petitioners' "demonstration" was only ancillary and incidental to their prime purpose—burial of their decedent.

Nor is this case controlled by *Adderley* v. *Florida,* 385 U.S. 39 (1966), or by *Cox* v. *Louisiana,* 379 U.S. 536 (1965), relied upon below. A cemetery, unlike a courthouse or a jail does not bear a special relation to the state which it must protect because of important state functions carried

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[6] 392 F.2d 83 (2d Cir.), cert. den., 393 U.S. 940 (1968).

[7] *Id.,* at 90.

[8] *Ibid.*

on there. Rather, this case involves an isolated physical area which exists for use by the public. Petitioners went there with a permit to engage in the prime purpose of the cemetery, that of burial. Their choice of symbols and ceremony cannot be censored because they are deemed political. Certiorari should be granted to correct the misinterpretation of this Court's decisions by the court below and to resolve the conflict with the Second Circuit in *Wolin* v. *Port Authority, supra.*

3. Secretary Resor's determination to bar petitioners' symbols from the national cemetery was a blatantly unconstitutional prior restraint. This Court has always held prior censorship to be one of the most serious infractions of the First Amendment, inasmuch as "prevention of that restraint was a leading purpose in the adoption of the [First Amendment]."[9] Indeed, apprehension of disorder has not occasioned endorsement of prior restraint by this Court, even where the speaker was known to "ridicule . . . and denounce . . . other religious beliefs in his meetings,"[10] where "charges are made of derelictions which constitute crimes,"[11] or where a permit was refused in order to prevent "riots, disturbances, or disorderly assemblage."[12] During his lifetime, petitioners' decedent won the right to speak without prior restraint in New York City, despite the "shocking

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[9] *Lovell* v. *Griffin*, 303 U.S. 444, 451-452 (1938). See *Grosjean* v. *American Press Co.*, 297 U.S. 233, 245-249 (1936); Chafee, *Free Speech in the United States*, 9-12 (1941).

[10] *Kunz* v. *New York*, 340 U.S. 290, 292 (1950).

[11] *Near* v. *Minnesota*, 283 U.S. 697, 720 (1931).

[12] *Hague* v. *C. I. O.*, 307 U.S. 496, 516 (1939).

quality" of his views.[13] It is a matter of no small irony that prior restraint has been approved by the court below to bar a burial in keeping with his beliefs. Certiorari should be granted to resolve the conflict between the decision of the court below and this Court's long line of decisions barring prior restraint.

4. This Court has often held that a right or privilege accorded one class or group under the Fifth or Fourteenth Amendments in its use of public property must be equally accorded similar groups.[14] As the record indicates, Secretary Resor would not have made the determination at issue here had the burial group been the American Legion or the Veterans of Foreign Wars, groups which also engage in political activity (R. 38). He would not have objected to their wearing their insignia or carrying their flags, banners, and distinctive floral arrangements.

It is clear that there is no rational distinction between petitioners and numerous other groups who engage in political activity and who continuously use national cemeteries and incidentally express their own philosophical and political ideas. Yet the District Court assumed that organizations such as the American Legion are not "politically motivated" but are "patriotic organization[s]" (App., *infra*, pp. 7a-8a). The Court thus chose to recognize one brand of politics while ignoring another.

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[13] *Rockwell* v. *Morris*, 211 N.Y.S.2d 25, appeal dismissed, 215 N.Y.S.2d 502, cert. den., 368 U.S. 913 (1961).

[14] See, e.g., *Tinker* v. *Des Moines Community School District*, *supra* at 510-511; *Cox* v. *Louisiana*, *supra* at 557; *Cox* v. *New Hampshire*, 312 U.S. 569, 576 (1941); *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963); *Niemotko* v. *Maryland*, 340 U.S. 268, 272 (1951); *West Virginia Board of Education* v. *Barnette*, *supra*.

Moreover §204 of the Army regulations authorizes the display of the Confederate flag. To many Americans, this flag represented and still represents overthrow of egalitarianism and of the present form of government. The facts prove that Secretary Resor has used an unlawfully discriminatory classification. The decision of the court below is at odds with this Court's rulings barring unlawful discrimination.

5. The decision of the District Court, adopted by the Court of Appeals, is so clearly erroneous and devoid of evidentiary support that due process has been denied and certiorari should lie.[15] The record is clear that petitioners went to the cemetery to bury their decedent. Clearly, a burial is not a political demonstration. Yet the District Court found that a "national cemetery is clearly committed to other purposes [than] the airing of grievances," and that the Secretary refused the use of the cemetery "as a base for the symbolic dissemination of their political philosophy" (App. *infra*, p. 7a). The only evidence in the record indicates that the controlling purpose of petitioners was burial, and there is no evidence that petitioners intended to air "grievances." To adopt the lower Court's view of the evidence is to insert a factual basis which is not supported by the record. The applicable decisions of this Court forbid the resulting denial of due process.

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[15] *Thompson* v. *Louisville*, 362 U.S. 199 (1960); *Garner* v. *Louisiana*, 368 U.S. 157 (1961); *Barr* v. *City of Columbia*, 378 U.S. 146 (1964); *Johnson* v. *Florida*, 391 U.S. 596 (1968).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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February, 1970

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 13474

MATT KOEHL *et al.*,

Plaintiffs,

—v.—

STANLEY R. RESOR, etc., and CLARK CLIFFORD, etc.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA

(Argued November 6, 1969 Decided November 24, 1969.)

Before:

SOBELOFF, WINTER & BUTZNER,

Circuit Judges.

PER CURIAM:

The judgment appealed from is affirmed on the opinion of the District Court.

296 F. Supp. 558 (E.D. Va. 1969).

Affirmed.

Opinion of the United States District Court

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

(Alexandria Division)

No. 4713-A

March 13, 1969

MATT KOEHL *et al.*,

Plaintiffs,

—v.—

STANLEY R. RESOR, etc., and CLARK CLIFFORD, etc.,

Defendants.

Order and Memorandum Opinion

OREN R. LEWIS, *District Judge.*

Matt Koehl and the American Nazi Party brought this suit against the Secretary of the Army and the Secretary of Defense to compel them to permit the members of the American Nazi Party to wear the party uniform with its concordant insignia and to display their banners and flags while conducting the funeral of George Lincoln Rockwell at Culpeper National Cemetery.

Jurisdiction was invoked under 24 U.S.C. §281, 5 U.S.C. §1001, 28 U.S.C. §§2201 and 2202, 28 U.S.C. §1361, and under the First and Fifth Amendments of the Constitution of the United States. Although the Government raised the

question of whether judicial review of the Secretary's decision pursuant to 24 U.S.C. §281 may be had, the Government did not seriously question the right of this Court to hear and determine this matter under the declaratory judgment statute and upon the constitutional questions raised.

Upon hearing, this Court was of the opinion that it had jurisdiction and that the suit ought to be dismissed, and

It Is So Ordered.

The record here made, consisting of the joint stipulation of facts and numerous exhibits, discloses that George Lincoln Rockwell died on August 25, 1967. He was, at the time of his death, president of the American Nazi Party. He was succeeded by the plaintiff, Matt Koehl, who currently holds that position. Mr. Koehl is also the legal custodian of Mr. Rockwell's remains.

The American Nazi Party is an unincorporated association headquartered in Arlington, Virginia. It is a political party which engages in political activity. It nominated and ran a candidate for Governor of Virginia in 1966. The American Nazi Party is the co-custodian of Mr. Rockwell's remains.

The named defendants were Secretary of the Army and Secretary of Defense at all times relevant to this suit.

Representatives of the American Nazi Party requested permission on August 28, 1967 to bury Mr. Rockwell's remains in Arlington National Cemetery. The Secretary of the Army advised the American Nazi Party that Mr. Rockwell was eligible to be buried in any national cemetery except Arlington and that the existing Army policy, in order to prevent political demonstrations, precluded unseemly demonstrations such as the wearing of uniforms, insignia

and emblems or the display of flags or banners of the American Nazi Party in any ceremony inside the cemetery.

The American Nazi Party then requested permission to bury Mr. Rockwell at the Culpeper National Cemetery. Permission was forthwith granted by the Secretary of the Army, subject to the same conditions previously mentioned. Burial was arranged for the morning of August 29, 1967.

A hearse bearing Mr. Rockwell's body, escorted by six walking persons dressed in khaki Nazi uniforms, combat boots and swastika armbands, and carrying Nazi flags and banners, proceeded to enter the Culpeper National Cemetery. The funeral party, composed of representatives and members of the American Nazi Party, was under the control of its president, Mr. Koehl. The group was stopped at the gate by the police and the superintendent of the cemetery. They informed Mr. Koehl that if the party wished to enter the cemetery and proceed to Mr. Rockwell's gravesite that all swastikas would have to be removed from the group and from the accompanying floral pieces and that no Nazi ceremony or rally would be allowed on the cemetery property.

Mr. Koehl and the members of the American Nazi Party refused to comply with these conditions and permission for the burial was then and there withdrawn.

The American Nazi Party on September 7th, through its attorney, again requested permission to bury Mr. Rockwell in the Culpeper National Cemetery. The Secretary of the Army replied, stating that the burial would be permitted but that the wearing of uniforms, insignia or emblems or the display of banners or flags of the American Nazi Party in the cemetery would not be permitted. The Secretary further stated that if these restrictions were observed there would be no objection to a gravesite eulogy by Mr. Koehl

or to music or singing in the manner indicated in their attorney's letter.

This suit followed.

That Congress has the power to acquire land for national cemeteries and to make all needful rules and regulations respecting the use of such property cannot be seriously questioned. See Art. IV, §3, of the United States Constitution.

National cemeteries first came into being in 1862 when Congress granted power to the President to purchase land to be used as a national cemetery for the soldiers who died in the service of the country. 12 Stat. 596. Congress made all the rules and regulations respecting the acquisition and maintenance of the national cemeteries and determined the classes of persons entitled to be buried therein until 1876. The maintenance of national cemeteries was then turned over to the Secretary of the Army. 19 Stat. 99. Congress still determines the classes of persons entitled to be buried in the national cemeteries.

The present statute pertaining to the national cemeteries was enacted in 1959, 73 Stat. 547, 24 U.S.C. §281. The pertinent sections of this statute read as follows:

> (a) Under such regulations as the Secretary of the Army may, with the approval of the Secretary of Defense, prescribe, the remains of the following persons may be buried in national cemeteries:
>
> (1) Any member or former member of the Armed Forces who served on active duty * * * and whose last such service terminated honorably.

This statute clearly commands that Mr. Rockwell's burial in a national cemetery is subject to the regulations duly

prescribed by the Secretary of the Army and approved by the Secretary of Defense.

The approved rules governing the operation, maintenance and burials in national cemeteries are found in the Army Technical Manual TM 10-287 and in supplemental rules and regulations made subsequent thereto. They provide, among other things, that the flag of the United States will be displayed at all national cemetery activities every day during the hours the gates are open, and that a small Confederate flag may be placed on the graves of Confederate dead at private expense either on Memorial Day or the day when Confederate Memorial Day is observed, providing these flags are removed at private expense on the first work day following the day observed as Confederate Memorial Day—other flags will not be permitted on graves.

Patriotic organizations may with proper permission conduct services purely memorial in purpose, patriotic in nature.

Visitor rules originally issued in connection with Arlington National Cemetery and enforced in all of the national cemeteries provide that no picketing of any type will be allowed in the cemetery—no demonstrations of any type, including sit-ins, lie-ins, sing-ins, and so forth, will be allowed—no signs, placards, banners, and so forth, will be allowed to be displayed within the cemetery except as part of an authorized ceremony—no oration of any type will be allowed except as approved by competent authority—introduction of any foreign flags not in accordance with prescribed flag ceremonies is prohibited.

These regulations were adopted to prevent the occurrence of political demonstrations or other conduct not in keeping with the nature of the national cemeteries as

permanent shrines to the honored dead of the armed forces of the United States.

Many groups have attempted to bring materials containing political symbols into the national cemeteries—all have been rebuffed—a request for a political-type meeting was recently denied by the Secretary of the Army. See Judge McGuire's opinion in the case of Dr. John C. Bennett, et al. v. Robert McNamara, et al., United States District Court for the District of Columbia, Civil Action No. 305-68. (The Court understands this case is now on appeal.)

The record here made conclusively discloses that it was the intent of the American Nazi Party to dramatize their political philosophy by wearing their Nazi-style uniforms together with combat boots, and displaying their banners and flags during the burial of their former leader. A national cemetery is a public place so clearly committed to other purposes that their use for the airing of grievances is anomalous. See Adderley v. Florida, 385 U.S. 39, 87 S. Ct. 242, 17 L. Ed.2d 149 (1966).

The Secretary of the Army was plainly right in refusing to permit the American Nazi Party to use the Culpeper National Cemetery as a base for the symbolic dissemination of their political philosophy.

There was no evidence in this case supporting the plaintiff's charge of discrimination. Their claim that other groups wearing uniforms with special insignia and emblems and carrying flags peculiar to their organizations are allowed to conduct burial ceremonies for their deceased members in national cemeteries, totally lacks evidentiary support. The groups referred to are the Knights of Columbus, the Masons and the American Legion. Surely no one seriously contends that these organizations are politically motivated or use national cemeteries to espouse

partisan political causes—the Knights of Columbus and Masons are both fraternal organizations—the American Legion is a patriotic organization.

Neither is the limited use of the Confederate flag on the graves of Confederate soldiers evidence of discrimination on the part of the Secretary of the Army—the use of that flag in national cemeteries cannot be equated with the intended use of the Nazi swastika banners in this case.

The plaintiff's contention that the Secretary's action herein stems from a dislike of the American Nazi Party's political philosophy and his desire to avoid political protestations by veterans' groups is likewise void of factual support in this record.

The Secretary of the Army has not required the American Nazi Party to surrender any of their alleged First Amendment rights in order to bury their former leader in a national cemetery—they have no constitutional right to bury Mr. Rockwell in the Culpeper National Cemetery with trappings and fanfare designed to espouse their political philosophy.

The plaintiffs cite the Tinker school case (Tinker v. Des Moines Independent Community School Dist., 393 U.S. ——, 89 S. Ct. 733, 21 L. Ed.2d 731), decided by the Supreme Court of the United States on February 24th of this year, to support their claim that the Government, through the Secretary of the Army, abridges their First Amendment rights in this case. The wearing of armbands (by school children) for the purpose of expressing certain views was held under the facts of the Tinker case to be the type of symbolic act that is within the free speech clause of the First Amendment. It should be noted, however, that Mr. Justice Fortas, speaking for the court in that case, pointed out that: "We properly read it [the First Amendment

right of free speech] to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. * * * "

See also Cox v. Louisiana, 379 U.S. 536, 85 S. Ct. 453, 13 L. Ed.2d 471 (1964).

This Court is of the opinion that the regulations of the Secretary of the Army barring the American Nazi Party's proposed political demonstration in the Culpeper National Cemetery were both reasonable and proper and that it is not the type of symbolic act that is within the free speech clause of the First Amendment.

Army Regulation TM10-287 (Aug. 8, 1961)*
(Relevant Portions)

202. Cemetery Hours

a. Except on Memorial Day or as specifically approved by The Quartermaster General, the cemetery gates will be opened every day throughout the year at 0800 hours and closed at 1700 hours, local time. Memorial Day, cemetery gates will remain open until 1900 hours, local time.

b. A metal plaque, the design of which has been provided or approved by The Quartermaster General, showing cemetery hours will be attached to the main entrance gate. The plaque will be lettered as follows:

OPEN EVERY DAY

8 AM—5 PM

Memorial Day 8 AM—7 PM

203. Visitors

a. Visitors will be admitted during the hours the gates are open.

b. Visitors will not be permitted to litter the grounds; cut, break, or injure trees, shrubs, or plants; use the cemeteries for sports, recreation, or picnic grounds; or otherwise desecrate the national cemeteries.

c. Superintendents will, in a courteous manner, apprise offenders of the regulations and if any further violations occur, such offenders will be asked to leave the cemetery. If

* R. 34-46.

it becomes necessary to arrest an offender, the superintendent will bring, or cause such person to be brought, before any United States Commissioner or judge of any district court of the United States within the state or district in which the cemetery is located, and there the superintendent will make complaint in due form. When this occurs, the superintendent will report the circumstances to the supervising commander by telephone and will request specific instructions (24 USC 286 and AR 290-5).

d. The use of national cemetery drives as public highways is prohibited. The speed of vehicles will not exceed 25 miles per hour. The supervising commander may, however, reduce the speed limit to that which he deems consistent with the public safety and other pertinent factors. The commander will prescribe and promulgate such rules as may be necessary to provide for safety and to control traffic including the number, operation, and parking of sightseeing buses or other vehicles.

e. When large crowds are anticipated, special advance plans will be developed to insure proper conduct by all concerned; to limit the number of vehicles in the cemetery to those that can be accommodated without undue congestion; to preclude parking in grave site or turfed areas; and to provide for safety.

204. Use of Flag

a. The flag of the United States, either post or storm type, will be displayed at all national cemetery activities every day during the hours the gates are open. General information regarding the rules and customs pertaining to the display, care, and disposition of the flag are contained in appendix III and SR 840-10-1.

b. The flag of the United States will be brought to half staff one-half hour before each funeral service, retained in this position throughout the ceremony, and returned to full staff one-half hour after the lowering of the remains into the grave. The flag will not be flown at half staff except for the occasions prescribed above and by AR 600-25.

c. On Memorial Day, 30 May, the flag of the United States will be flown at half staff until 1200 hours and at full staff from 1200 hours to 1900 hours.

d. (1) On the work day immediately preceding Memorial Day, all graves in National Cemetery installations will be decorated with small United States flags at government expense.

(2) *A small Confederate flag of a size and on a staff not exceeding the length of that of the U. S. flag may be placed on graves of Confederate dead at private expense either on Memorial Day or the day when Confederate Memorial Day is observed, provided that those desiring to place such flags agree in writing to absolve the government from any responsibility for loss of or damage to such flags and also agree to remove the flags as required by (6) below.* (Emphasis added.)

(3) The U. S. flags will be placed on the graves in an upright position 1 foot in front of and centered with the headstone or marker.

(4) Confederate flags will be placed on the graves in the same position as U. S. flags except when displayed simultaneously with the U. S. flag. On such occasions the Confederate flags will be placed 3 feet from the headstone or marker and

the height of the flags above-ground will not exceed the height of the U. S. flags.

(5) In the case of group burials which are marked by one headstone, monument, or marker, only one U. S. grave decorating flag will be used. This restriction is also considered appropriate for Confederate flags.

(6) Except as otherwise provided herein, U. S. flags will be removed from the graves on the first work day after Memorial Day and Confederate flags will be removed at private expense on the first work day following the day observed as Confederate Memorial Day. If the flags are wet, they may be allowed to remain on the graves until dry. When Memorial Day falls on Sunday and is observed on Monday, U. S. flags will be emplaced on Friday and removed the following Tuesday. When Memorial Day falls on Saturday and Friday is a holiday, flags will be emplaced on Thursday and removed the following Monday.

(7) Flags will not be permitted on graves except as outlined herein.

(8) The acceptance of voluntary assistance from individuals or groups in placing and removing U. S. flags is authorized and encouraged.

a. General. Patriotic organizations may, with proper permission, conduct services purely memorial in purpose, patriotic in nature in national cemeteries. Requests for permission will be addressed to the superintendent of the individual cemetery who will assign an appropriate time and

will render his assistance in carrying out the program. No organization will be given exclusive permission for any cemetery or for any particular occasion. Where several requests are received for separate services, the superintendent will schedule each so as to avoid overlapping or interference.

b. Special Occasions. Many organizations regularly conduct such services on Memorial Day, Veterans' Day, Easter Sunday, national holidays, and other special occasions. The procedure governing such services will be essentially as above, except that when Memorial Day falls on Sunday the ceremonies may be held on Sunday or Monday. (Emphasis supplied.)

405. Interment Services and Facilities

a. Services Provided.

(1) Supervising commands will provide burial equipment as justified by the interment workload of each cemetery. Equipment will not be provided for use on burial vaults, extremely heavy caskets which can not be handled without special equipment or other abnormal requirements which can not be justified by the normal burial activities.

(2) Superintendents will explain services and facilities available without charge to the NOK or their agent when they make burial arrangements. Services and facilities furnished normally include opening, preparation and closing of the grave, placement and use of decorating grass sets, casket lowering device, chapel tents or canvas shelter, chairs, and ground cloths for each burial service.

(3) The Department of the Army will not object to the use of special or additional facilities if they are desired and arranged for privately by the next-of-kin or their agent in making the funeral arrangements; however, in all such cases, the availability of cemetery furnished services without charge will be made known to next-of-kin or his agent.

(4) The furnishing of services and facilities at private expense, more elaborate than those available at the national cemetery will not be used as a basis for a request to higher authorities for the provision of more elaborate services and facilities by the Department of the Army.

(5) In cases where private contractors (funeral directors) perform graveside functions and provide services ordinarily performed by national cemetery personnel, the provision of such services will be construed as subject to the following:

(a) The use of such private services will be fully coordinated with the superintendent so that his part in the burial service can be properly arranged.

(b) That a determination is made by the superintendent in each case, preferably by certificate from the contractor, that the provision of such parallel services by the funeral director in lieu of those available from the cemetery, will not increase the funeral charges.

(6) The superintendent will inform funeral directors or others arranging for interments that the acceptance of fees or gratuities by cemetery employees is prohibited.

b. Burial Vaults.

(1) The use of metal, asphalt, concrete, and other types of burial vaults and grave liners at private expense in national cemeteries is authorized. In all such cases, contractual arrangements therefor will be made by the next-of-kin. The cemetery must be notified of the outside dimensions of the vault or liner in sufficient time so that a grave of proper size can be prepared. It will be the responsibility of the contractor to furnish equipment and personnel and place the vault or liner in the grave prior to the funeral service and to place the lid or cover properly after the service is concluded. If the design of the vault and/or cover or method of use is not compatible with the use of burial equipment furnished by the government, such as the casket lowering device or tent, it will be the responsibility of the contractor to furnish suitable equipment and personnel to supplant these items in each case.

(2) Cemetery personnel will exercise caution to avoid conveying the impression to the next-of-kin that the use of a vault or liner is a requirement of the government.

(3) The activities of vault installation personnel will be regulated by appropriate cemetery personnel to assure that such activities and equip-

ment do not conflict with or detract from funeral ceremonies.

c. Shipping Cases.

(1) When shipping cases are delivered in advance of the remains of decedents, funeral directors are expected to deliver them to the gravesite at least one hour before funeral services are held. If the grave has been excavated and is ready for dressing, the funeral director should place the shipping case in the grave. If reasonably available, as determined by the superintendent, cemetery labor may assist in placing the shipping case. If the grave is not completely dug or pumping is required, the funeral director should place the case adjacent to the grave for later placement in the grave by cemetery labor when the grave "set-up" is prepared.

(2) Storage facilities are not provided in national cemeteries for overnight storage of shipping cases.

d. Placement of Flowers. Flowers and floral pieces, which normally are delivered to the cemetery immediately prior to the arrival of the funeral party, should be placed and arranged adjacent to the grave by the funeral director or his representative. When close scheduling occurs and if personnel of the cemetery labor force can be made available without undue interference with other assigned tasks, they may be authorized by the superintendent to assist in carrying the floral pieces from the delivery vehicle to the gravesite. It should not be implied or inferred

that assistance in placing the floral pieces prior to a funeral by cemetery labor is an obligation of the cemetery since this is a service for which the funeral director normally is responsible.

e. Pallbearers. Cemetery personnel will not act as pallbearers. Except in those cemeteries where military pallbearers are available, as determined by the military commander concerned, superintendents will inform funeral directors in charge of funerals that they are obligated to provide sufficient pallbearers, if not provided by relatives.

Announcement of Army National Cemetery Policy Respecting American Nazi Party (Aug. 28, 1967)*

The Department of the Army has determined that under the law (title 24, paragraph 281, U.S. Code), George Lincoln Rockwell is eligible for burial in a national cemetery (other than Arlington National Cemetery) as a former member of the Armed Forces who served on active duty and whose last such service terminated honorably.

Officials of the American Nazi Party have now asked that he be buried in Arlington National Cemetery. They have been informed that he is not eligible under the criteria in effect since 17 February 1967 which restricts burials to persons on active duty, retired military personnel, recipients of the Medal of Honor, certain high U.S. Government officials, and dependents of the foregoing and of other persons already buried in Arlington.

A national cemetery is a permanent shrine to the honored dead of the Armed Forces of this country. Burial ceremonies must be conducted with dignity, and with proper concern for the sensibilities of those whose loved ones lie there. Accordingly, unseemly demonstrations such as the wearing of uniforms, insignia and emblems, or the display of flags or banners of the American Nazi Party or its members, will not be permitted at ceremonies in a national cemetery.

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* Joint Exhibit 1-A (R. 9, 109).

Letter From Plaintiffs' Counsel to Secretary Resor*

COHEN, HIRSCHKOP & HALL
110 N. Royal Street
P. O. Box 234
Alexandria, Virginia 22313

September 7, 1967

The Honorable Stanley R. Resor
Secretary of the Army
The Pentagon
Washington, D. C. 20310

Dear Secretary Resor:

This will inform you that I have, through requests made to the A.C.L.U., been retained by Matt Koehl and the National Socialist White Peoples Party, also known as the American Nazi Party or George Lincoln Rockwell, Inc., to represent them in securing proper burial for the remains of George Lincoln Rockwell. I think it is unnecessary to review all the procedures up until this time but I do refer you to your statement of August 28, 1967, determining that the late George Lincoln Rockwell did qualify for burial in a national cemetery.

I accordingly would ask that you again authorize such interment in view of the following conditions. It is the belief of the American Civil Liberties Union that the Army should not get in the area of judging one symbol against another or symbols that may be worn or shown or expressed in any manner on federal property. It is our posi-

* Joint Exhibit 5-E (R. 10-11).

tion that the Army does have charge of the cemeteries and may regulate conduct in the interest of preserving the peace.

In this regard, I am authorized to assure you that the above referred to parties do not in any way plan any actions which would constitute a breach of the peace. It is their intention to have a very short ceremony at graveside which would not last more than thirty to forty-five minutes. Music will be played or a tape recorder loud enough to be heard only at graveside. There will be a short ceremony at which Matt Koehl will deliver the only formal eulogy. At the conclusion of the brief above ceremony, at most several songs will sung. At that time the ceremony being concluded, all of the funeral party will immediately leave the national cemetery grounds.

We would further ask that if the Army grants this request, as we strongly believe they should, that we be given opportunity to arrange a convenient date for the burial.

Once again, let me assure you that I fully believe that these people are solely interested in giving a proper burial and paying their last respects to the late George Lincoln Rockwell, who by virtue of his prior military service has previously earned this right. We stand ready to make

whatever assurances are necessary towards proper conduct at graveside.

Very truly yours,

/s/ PHILIP J. HIRSCHKOP
Philip J. Hirschkop

ROBERT JORDAN, III
Office of the General Counsel
United States Army
The Pentagon
Washington, D. C.

MATT KOEHL
6150 Wilson Boulevard
Arlington, Virginia

LARRY SPEISER
American Civil Liberties Union
1426 16th Street, N. W.
Washington, D. C.

Letter From Secretary Resor to Plaintiffs' Counsel*

DEPARTMENT OF THE ARMY
Washington, D. C. 20310

[Emblem] 29 Sep. 1967

Mr. Philip J. Hirschkop
Cohen, Hirschkop, Moorcones & Hall
110 North Royal Street
Alexandria, Virginia 22314

Dear Mr. Hirschkop:

This is in response to your letter of 7 September 1967 requesting that the Department of the Army authorize the burial of the remains of George Lincoln Rockwell in a national cemetery. The Department of the Army position with respect to the burial of Mr. Rockwell's remains was expressed on 28 August 1967. A copy of the policy statement issued at that time is enclosed. [See p. 19a, *supra.*]

I see no reason to alter the policy established at that time. Accordingly, burial will not be permitted if the ceremony involves the wearing of uniforms, insignia or emblems, or the display of flags or banners of the American Nazi Party or its members. If these restrictions are observed, there will be no objection to a graveside eulogy by Mr. Koehl or to music or singing in the manner indicated in your letter.

If your clients wish to proceed in a manner consistent with the policies outlined above, a new application for

* Joint Exhibit 6-F (R. 108).

burial should be filed and should be accompanied by a statement summarizing the procedures to be followed in connection with the ceremony.

Sincerely,

/s/ STANLEY R. RESOR

Stanley R. Resor
Secretary of the Army

Enclosure
As Stated

LIBRARY
SUPREME COURT, U. S.

FILED
MAR 25 1970
JOHN F. DAVIS, CLERK

No. 1222

In the Supreme Court of the United States

OCTOBER TERM, 1969

MATT KOEHL and THE AMERICAN NAZI PARTY,

PETITIONERS

v.

STANLEY R. RESOR, Secretary of the Army, and MELVIN R. LAIRD, Secretary of Defense

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OCTOBER TERM, 1969

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 2a-9a) is reported at 296 F. Supp. 558. The order of the court of appeals (Pet. App. 1a), affirming on the opinion below, is reported at 417 F. 2d 1338.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1969. The petition for a writ of

certiorari was filed on February 21, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners have a constitutional right to display political symbols—Nazi flags and swastikas —as an adjunct to a funeral ceremony in a national cemetery.

STATEMENT

George Lincoln Rockwell, President of the American Nazi Party (also known as the National Socialist White People's Party), was assassinated on August 25, 1967. His remains were cremated, and petitioners Koehl and the Party are co-custodians of the ashes. This suit arises in connection with Rockwell's interment.

As an honorably discharged veteran, Rockwell was eligible for burial in any national cemetery except Arlington. A permit was accordingly issued by the Secretary of the Army for Rockwell's burial at Culpeper National Cemetery. It provided, however, that Nazi emblems and insignia were not to be displayed. (J.A. 14-15.)[1] The cortege arrived at Culpeper on August 29, 1967, accompanied by members of the funeral party in the attire of Nazi stormtroopers. They wore Nazi uniforms, including swastika arm bands. Nazi flags, banners and swastika-decorated

[1] "J.A." refers to the Joint Appendix in the court of appeals.

floral pieces were displayed. The Superintendent of the cemetery reiterated the Army's policy, provided the group with a copy of the applicable regulations, and requested that Nazi insignia be removed. After examining the regulations, petitioner Koehl stated that the group would not comply with the permit by removing the insignia. Rockwell was therefore not buried at that time. (J.A. 15-16.)

Subsequently, petitioners' counsel wrote the Secretary of the Army to request burial authorization, asserting that the Army had no right to restrict the "symbols that may be worn or shown or expressed in any manner on federal property" (Pet. App. 20a). The Secretary again indicated that a permit would be issued, but declined to authorize the use of insignia of the Nazi party (Pet. App. 23a-24a). The Secretary did, however, grant the request for graveside music and singing, as well as a eulogy by petitioner Koehl (Pet. App. 23a).

Petitioners thereafter brought this suit. Acting on a stipulation of facts, the district court dismissed the action on the ground that a national cemetery is so committed to other purposes that it would be inappropriate to permit political demonstrations there. The court also found "no evidence in this case supporting the plaintiff's charge of discrimination" (Pet. App. 7a). The court of appeals affirmed on the opinion of the district court (Pet. App. 1a).

ARGUMENT

The courts below correctly held that the government may properly deem national cemeteries to be inappropriate sites for political demonstrations. Of the entire spectrum of public places, the national cemeteries surely rank high among those places "so clearly committed to other purposes that their use for the airing of grievances is anomalous". *Adderley* v. *Florida*, 385 U.S. 39, 54 (dissenting opinion). See, also, *id.* at 41; *Cox* v. *Louisiana*, 379 U.S. 536, 555.

Unlike a public school, which is particularly committed to the free market in ideas, see *Tinker* v. *Des Moines School District*, 393 U.S. 503, or a public street, which is essential to assembly and communication among citizens, see *Hague* v. *C.I.O.*, 307 U.S. 496, 515 (opinion of Mr. Justice Roberts), a national cemetery is peculiarly a place of repose and serenity. It is a dedicated place, visited by mourners and relatives of the servicemen who rest there. For some it is also hallowed ground, a place of worship as well as bereavement. As custodian of the cemetery, the Secretary has the responsibility, not merely to prevent breaches of the peace as petitioners contend (Pet. App. 20a-21a), but to protect the sensibilities of mourners and worshippers and the tranquility and dignity of the national burial grounds against intrusion by the type of demonstration planned here.

We stress that the Secretary's action to preserve the character of the burial ground leaves all other channels of communication open. Cf. *United States*

v. *O'Brien*, 391 U.S. 367, 388-389 (concurring opinion). The public streets, the national parks, meeting halls—none is affected by the Secretary's action. In addition, the eulogy to be delivered by petitioner Koehl may be utilized for the expression of whatever views he may deem appropriate in connection with the burial. The Secretary's regulation does not prevent Rockwell's remains from being interred in the cemetery and goes only so far as is necessary to maintain the national cemetery's serenity and dignity.

Petitioners' claim of unconstitutional discrimination is without merit. The regulations permit patriotic organizations to "conduct services purely memorial in purpose" in national cemeteries. Department of the Army Technical Manual 10-287 ¶ 205a (Pet. App. 13a). The record shows that no group other than the Nazis has attempted to bring the symbols of any political party into a national cemetery (J.A. 17, ¶ 14). While the symbols of veterans' organizations have been permitted, that distinction rationally reflects the purposes of the national cemeteries.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.

ROBERT V. ZENER,
DONALD L. HOROWITZ,
Attorneys.

MARCH 1970.

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